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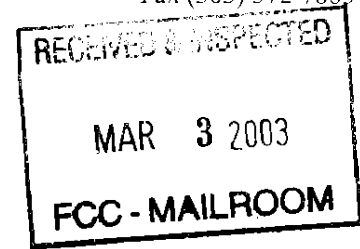
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February 28, 2003



Via Federal Express

Marlene H. Dortch, Secretary
Federal Communications Commission
9300 East Hampton Drive
Capitol Heights, MD 20743

**Re: IN THE MATTER OF REQUEST FOR REVIEW BY BUSINESS DISCOUNT
PLAN, INC. OF THE DECEMBER 31, 2002 DECISIONS OF UNIVERSAL
Docket Nos. 97-21 and 96-45 SERVICE ADMINISTRATOR DENYING
REQUEST TO ACCEPT LATE-FILED FCC FORMS 457,
499-S, 499-A AND 499-Q**

Dear Marlene:

Enclosed for filing please find the original and four (4) copies of the **REQUEST FOR REVIEW BY BUSINESS DISCOUNT PLAN, INC. OF THE DECEMBER 31, 2002 DECISIONS OF UNIVERSAL Docket Nos. 97-21 and 96-45 SERVICE ADMINISTRATOR DENYING REQUEST TO ACCEPT LATE-FILED FCC FORMS 457, 499-S, 499-A AND 499-Q** to be with the in the above referenced matter.

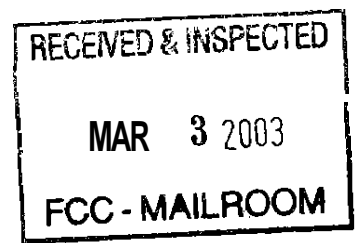
Please return a stamped copy to this office using the enclosed FEDEX label. Thank you.

Yours very truly,

Scott T. Wesley

enclosures

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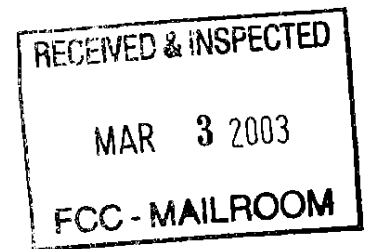


**Before the
Federal Communications Commission (F.C.C.)**

IN THE MATTER OF REQUEST FOR)	
REVIEW BY BUSINESS DISCOUNT)	
PLAN, INC. OF THE DECEMBER 31,)	
2002 DECISIONS OF UNIVERSAL)	Docket Nos. 97-21 and 96-45
SERVICE ADMINISTRATOR DENYING)	
REQUEST TO ACCEPT LATE-FILED)	
FCC FORMS 457, 499-S, 499-A AND 499-Q)	

**APPEAL OF THE DECEMBER 31, 2002 DECISIONS
OF THE UNIVERSAL SERVICE ADMINISTRATOR**

Before the
Federal Communications Commission (F.C.C.)



IN THE MATTER OF REQUEST FOR)
REVIEW BY BUSINESS DISCOUNT)
PLAN, INC. OF THE DECEMBER 31,)
2002 DECISIONS OF UNIVERSAL) Docket Nos. 97-21 and 96-45
SERVICE ADMINISTRATOR DENYING)
REQUEST TO ACCEPT LATE-FILED)
FCC FORMS 457,49943,499-A AND 499-Q)

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**Before the
Federal Communications Commission (F.C.C.)**

IN THE MATTER OF REQUEST' FOR)	
REVIEW BY BUSINESS DISCOUNT)	
PLAN, INC. OF THE DECEMBER 31,)	
2002 DECISIONS OF UNIVERSAL)	Docket Nos. 97-21 and 96-45
SERVICE ADMINISTRATOR DENYING)	
REQUEST TO ACCEPT LATE-FILED)	
FCC FORMS 457,4994,499-A AND 499-Q)	

Appellant Business Discount Plan, Inc. ("BDP"), through its attorneys, Shughart Thomson & Kilroy, P.C., for its Request For Review of the Universal Service Administrator's ("USA") December 31, 2002 Decision denying BDP's request to accept late-filed FCC forms 457, 499-S of, 499-A and 499-Q, respectfully states as follows:

I. SUMMARY OF FILING

BDP appeals the Universal Service Administrative Company's ("USAC") August 28, 2002 Decisions rejecting BDP's revised FCC Forms 457, 499-A, 499-S, and 499-Q for the years ending December 31, 1998, 1999, 2000 and 2001. In its August 28, 2002 Decisions, the USAC rejected BDP's revised Forms as untimely and denied BDP's request for reimbursement in the amount of \$1,016,738.43. On October 23, 2002, BDP timely filed its Letter of Appeal with the USAC. By letter dated December 31, 2002, the USAC denied in part, and dismissed as moot in part, BDP's Letter of Appeal. In denying, in part, BDP's Letter of Appeal, the USAC stated that BDP's revised FCC Forms were untimely because they were not filed "within twelve months from the initial due date of the worksheets in question."

The USAC's denial of BDP's Letter of Appeal is legally flawed for several reasons. First, the USAC's one-year statute of limitations for filing revised FCC worksheets is invalid because it is substantive in nature and created without following the APA notice and comment rulemaking process. As shown below, the USAC's one-year statute of limitations does not meet the exceptions for interpretive rules; general statements of policy; or agency organization, procedure or practice. Thus, the USAC's (and the FCC's) failure to comply with mandatory APA rulemaking procedures renders the one-year statute of limitations invalid and unenforceable,

The USAC's one-year statute of limitations for filing revised FCC Forms 499-A and 499-Q is also invalid because it exceeds the USAC's authority, and is arbitrary and capricious and an abuse of discretion. The USAC has no authority to promulgate substantive rules. Moreover, the USAC provided no explanation, reasoned or otherwise, as to the basis for the one-year statute of limitations.

Finally, assuming the USAC properly adopted the deadlines for filing revisions to Forms 499-A and 499-Q, BDP has demonstrated good cause for the FCC to waive the deadlines. In similar circumstances, the FCC has granted waivers of these deadlines, reasoning that absent a waiver, the telecommunications provider would be required to contribute an erroneous amount to support universal service, a result contrary to the requirement that contributions be equitable.

II. STATEMENT OF BDP'S INTEREST IN THE MATTER PRESENTED FOR REVIEW

BDP is a long distance carrier providing long distance service to customers throughout the United States. Pursuant to Section 42 of the 1996 Telecommunications

Act, 47 U.S.C. § 42, and the FCC's regulations promulgated thereunder, BDP has paid universal service fund contributions to the Universal Service Administration Co. ("USAC"). However, due to an error more particularly described below, BDP overstated its revenues and, in turn, overpaid the USAC by \$1,016,738.43. **As** the entity that made the overpayment in universal service fund contributions to the USAC, BDP has a very substantial interest in this matter. Specifically, BDP seeks to obtain a refund of all amounts overpaid to the USAC in universal service fund contributions, together with interest at the statutory rate.

III. STATEMENT OF FACTS

BDP Timely Filed Its FCC Forms 457, 499-A, 499-S and 499-Q

BDP timely filed its FCC Forms 457, 499-A, 499-S and 499-Q with a accompanying worksheets (Telecommunications Reporting Worksheets) reporting its revenues for the years ended December 31, 1998; December 31, 1999; December 31, 2000; and December 31, 2001. (Affidavit of Craig Konrad, "Konrad Affidavit," at ¶ 2, attached hereto as Exhibit A".)

Upon Discovering That It Had Significantly Overstated Its Revenues, BDP Promptly Filed Revised FCC Forms 457, 499-A, 499-S, and 499-Q

At the end of July 2002, BDP discovered, through an audit conducted by its independent auditors, that it had overstated its revenues, and thus overpaid the Universal Service Administrative Co. ("USAC") by \$1,016,738.43 in the period 1998 through 2001. On August 5, 2002, promptly after discovering that it had overstated its revenues, BDP filed amended FCC Forms 457, 499-A, 499-S, and 499-Q, and accompanying

Telecommunications Reporting Worksheets, for the years ended December 31, 1998, December 31, 1999, December 31, 2000 and December 31, 2001. (Konrad Affidavit, at ¶ 3, Attachment 1, thereto).

In its transmittal letter enclosing the revised Forms, BDP explained that its original above-referenced FCC Forms had significantly overstated BDP's gross revenues for these above-referenced periods. BDP further explained that these significant overstatements were mistakenly based upon incorrect gross revenue information supplied to BDP by Billing Information Concepts, Inc. ("BIC"), BDP's billing aggregator responsible for the billing of BDP's long distance service. Moreover, BDP explained that in July 2002, its independent auditors, Query & Co., had completed an audit of BDP's unrelated excise and sales tax for the years in question. Upon completion of this audit, BDP's auditors discovered that the revenue reports BIC had supplied BDP for 1998 through 2001 failed to appropriately reduce BDP's revenues by deducting substantial adjustments and credits to BDP's customer billings to which BDP was entitled. In explaining the error, BDP included with its revised FCC Forms and accompanying Telecommunications Reporting Worksheets a complete analysis of the exact amount BDP had owed USAC for the years 1998 through 2001. This analysis showed that BDP had overpaid the USAC \$1,016,738.43. (Konrad Affidavit, at ¶ 4).

**The USAC Rejects BDP's Revised Forms As Untimely
and Denies BDP's Request for Reimbursement**

By six separate letters dated August 28, 2002 (the "August 28 Decisions"), the USAC rejected BDP's revised Forms as untimely and denied BDP's request for reimbursement. (The USAC's August 28 Decisions are attached hereto as Exhibits B-C.)

Specifically, the **USAC** rejected BDP's revised FCC Forms as untimely because they were "not filed prior to the revision deadlines" (Exhibit B), they were "not filed by January 31, 2001," (Exhibits C-D), or because "they were not filed within one year of the original submission" (Exhibits E-G).

Significantly, in its August 28 Decisions, the USAC failed to reference or cite to any statutory provision or FCC rule requiring a carrier to submit revised Forms "prior to the revision deadlines," or "by January 31, 2001," or "within one year of the original submission." Instead, the USAC noted, and only with respect to one of its six August 28 Decisions *viz.*, Exhibit B, that "[p]er FCC Form 499-Q instructions on page 8, ' revised filings must be made by the filing date for the subsequent for 499 filing.'"

BDP Timely Filed a Letter of Appeal with the USAC

By letter dated October 23, 2002 ("Letter of Appeal"), BDP appealed the USAC's August 28 Decisions to the USAC. In its Letter of Appeal, BDP again explained that its original FCC Forms had significantly overstated BDP's gross revenues for the years 1998 through 2001 due to the incorrect gross revenue information supplied to BDP by BIC. In its Letter of **Appeal**, BDP also showed that USAC's reliance on the instructions to the FCC Forms to arrive at a statute of limitations was misplaced. Specifically, BDP showed that any statute limitations contained in these instructions were invalid since they were not subject to notice and comment as required under the Administrative Procedures Act ("APA"), 5 U.S.C. § 552. Moreover, BDP showed that it had not received adequate prior notice of any purported statute of limitation. Also, BDP showed that the USAC's reliance

on the instructions was arbitrary and capricious and an abuse of discretion. (A copy of BDP's October 23, 2002 Letter of Appeal is attached hereto as Exhibit H).

The USAC's December 31, 2002 Decision

By letter dated December 31, 2002, the USAC entered its Administrator's Decision on Contributor Appeal (the "Decision"). In its Decision, the USAC denied in part, and dismissed as moot in part, BDP's Letter of Appeal. Specifically, the USAC ruled that BDP submitted revenue data on its FCC Form 499-A reporting 2001 annual revenue, which was timely filed on April 26, 2002. The USAC noted that annual revenue information from the Form 490-A will be used to ensure that contributions for the entire year are based on all subject revenues for the year. The USAC ruled that BDP's revised FCC Form 499-A submitted on April 26, 2002 properly revised the revenue reported on BDP's Forms 499-Q reporting first, third and fourth quarter 2001 revenue. Thus, the USAC dismissed BDP's Letter of Appeal as moot insofar as it pertained to these revised FCC Form-Qs. (A copy of the USAC's Decision is attached hereto as Exhibit I).

The USAC, however, denied BDP's Letter of Appeal concerning all other BDP revised FCC Forms. In denying BDP's Letter of Appeal with respect to these revised Forms, the USAC merely stated that "[t]he FCC Worksheets and accompanying instructions which BDP attempted to revise were reviewed and approved by the FCC." The **USAC** further noted that FCC regulations in force during the relevant time period required carriers to file FCC worksheets. *Id.* citing *generally* 47 C.F.R. Part 54, (Exhibit I).

The USAC next noted in its Decision that FCC regulations do not require the **USAC'** to accept any late filed revised FCC Worksheets. However, the USAC acknowledged that "in order *to* improve the accuracy of the revenue reported, the IJSAC' Board of Directors has authorized staff *to* allow carriers to file new or revised worksheets after the original due date." In accordance with this gracious authorization by the USAC Board of Directors, the IJSAC acknowledges that "[s]ince September 1, 1999, USAC has allowed carriers to file new or revised FCC Worksheets after the original due date and for a period limited **up** to 12 months from the initial due date of the worksheets in **question.**" Id. (emphasis added). (Exhibit 1).

Thus, in rejecting BDP's revised FCC worksheets, the USAC found that "[b]ecause BDP's revised FCC Worksheets identified on the chart below were submitted after the original due date and beyond the USAC's one-year deadline for filing of revisions, they were rejected." Id. (emphasis added). (Exhibit 1).

BDP appeals the Decision to the Federal Communications Commission ("FCC" or "Commission") pursuant to 47 C.F.R. § 54.719.

IV. QUESTIONS PRESENTED FOR REVIEW

A. Is the USAC's one-year statute limitations for filing revised FCC Forms 499-A and 499-Q invalid because it is substantive in nature and created without following the APA notice and comment rulemaking process?

B. Did the USAC' exceed its authority in adopting its one-year statute of limitations for filing revised FCC Forms 499-A and 499-Q?

C. Is the USAC's one-year statute limitations for filing revised FCC Forms 499-A and 499-Q arbitrary and capricious!

D. Is the USAC's one-year statute limitations for filing revised FCC Forms 409-A and 499-Q an abuse of the USAC's discretion?

E. Assuming, arguendo, that the USAC properly adopted the deadlines for filing revisions to FCC Forms 499-A and 499-Q, has BDP demonstrated good cause for the FCC to waive these deadlines?

V. ARGUMENT

A. The USAC's One-Year Statute Limitations for Filing Revised FCC Worksheets Is Invalid Because It Is Substantive in Nature and Created Without Following the APA Notice and Comment Rulemaking Process

1. The Assessment and Recovery of Universal Service Contributions

a. The assessment and recovery of universal service contributions are governed by § 254 of the 1996 Telecommunications Act

The Universal Service Fund is a funding mechanism mandated and expanded under the federal Telecommunications Act of 1996, 47 U.S.C. § 254 (2002). The assessment and recovery of universal service contributions are governed by the statutory

framework established by Congress in the Communications Act of 1934, as amended. 47 U.S.C. § 201, 202 and 254.¹

Section 254(b) sets forth the FCC's authority to administer and implement the Universal Service Fund program, as well as the carriers' obligations to contribute to the Universal Service Fund. 47 U.S.C. § 254(a)(2), (d), and (g). Section 254 instructs the Commission to establish universal service support mechanisms with the goal of insuring the delivery of affordable telecommunications services to all Americans, including consumers in high-cost areas, low-income consumers, eligible schools and libraries, and rural health care providers. *Id.* citing 47 U.S.C. § 254(b).

Section 254(d) of the Communications Act states that "[e]very telecommunications carrier that provides interstate telecommunications service shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and enhance universal service." *Id.* citing, *inter alia*, 47 U.S.C. § 254(d) (emphasis added); 47 U.S.C. § 254 (h)(4)(5) (providing that Commission policy on universal service shall be based, in part, on the principles that contributions should be equitable and nondiscriminatory, and support mechanisms should be specific, predictable, and sufficient). (Emphasis added).

b. The FCC's methodology for assessing universal service contributions

In its 1997 Universal Service Order², the FCC decided to assess contributions on contributors' gross-billed end-user telecommunications revenues. Specifically, the FCC

¹ In the Matter of Federal-State Joint Board on Universal Service, Report and Order and Second Further Notice of Proposed Rulemaking, CC Docket No. 06-45, Released December 11, 2002, 2002 WL 31778741 (FCC), at ¶ 7.

concluded that assessments based on end-user telecommunications revenues would be competitively neutral, would be easy to administer, and would eliminate some economic distortions associated with an assessment based on gross telecommunications carriers' revenues. Universal Service Order, 12 FCC Rcd at 9206-09, ¶¶ 844-50.

In its Second Order on Reconsideration³, the FCC set forth the specific method of computation for universal service contributions. The FCC also designated the USAC as the neutral entity responsible for administering the universal service support mechanisms, including billing contributors, collecting contributions to the universal service support mechanisms, and disbursing universal service support funds. Id. at 18423-24, ¶ 41; *see also* 47 C.F.R. § 54.701

The FCC required contributors to report their end-user telecommunications revenues to the USAC on a Telecommunications Reporting Worksheet semi-annually, and contributions were based on the reporting of billed end-user telecommunications revenues from the prior year. Second Order on Reconsideration, 12 FCC Rcd 18400, Appendix B; *see also* 47 C.F.R. § 54.711(a) (providing that "[c]ontributions shall be calculated and filed in accordance with the Telecommunications Reporting

² Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9205-07, ¶¶ 843-44 (1997), as corrected by Federal-State Joint Board on Universal Service, Erratum, CC Docket No. 96-45, FCC 97-157 (rel. June 4, 1997) and Erratum, 13 FCC Rcd 24493 (1997), *aff'd in part, rev'd in part, remanded in part sub nom, Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999), cert. denied, 530 U.S. 1210 (2000), cert. dismissed, 531 U.S. 975 (2000) (Universal Service Order).

³ Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service, CC Docket Nos. 96-45, 97-21, Report and Order and Second Order on Reconsideration, 12 FCC Rcd 18400 (1997) (rel. July 18, 1997) ("Second Order on Reconsideration").

Worksheet..."); Second Order on Reconsideration, 12 FCC Rcd at 18424, ¶ 43, 18442, ¶ 80. 18501-02, Appendix C.

c. The FCC's Consolidated Reporting Order and FCC Form 499-A

Subsequent to its Second Order on Reconsideration, in an effort to reduce the administrative burdens on contributors, the FCC consolidated carrier reporting requirements. (“Consolidated Reporting Order”).⁴ Thus, in lieu of making four separate filings, reporting carriers would simply file one copy of the new 499-A worksheet on April 1 of 2000 and each following year. Id. at ¶ 1.⁵ The FCC emphasized that it **was** not imposing new reporting requirements, but instead its goal was “to simplify the requirements to the greatest extent possible while continuing to ensure the efficient administration of the support and cost recovery mechanisms.” Id. at ¶ 1. Indeed, the FCC noted that, with certain limited exceptions, it was not revisiting, among other things, the

⁴ See 1998 Biennial Regulatory Review-Streamlined Contributory Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number of the Portability, and Universal Service Support Mechanisms, CC Docket 98-171, Report and Order, 14 FCC Rcd 16602 (1999) (Consolidated Reporting Order); *see also* Common Carrier Bureau Announces Release of September Version of Telecommunications Reporting Worksheet (FCC Form 499-S) for Contributions to the Universal Service Support Mechanisms, CC Docket No. 98-171, Public Notice, DA 99-1520 (rel. July 30, 1999), Common Carrier Bureau Announces Release of Telecommunications Reporting Worksheet (FCC Form 499-A) for April 1, 2000 Filing by All Telecommunications and Carriers, CC Docket No. 98-171, Public Notice, 15 FCC Rcd 1644 (Comm. Car. Bur. 2000).

⁵ Prior to the FCC's Consolidated Reporting Order, FCC rules required telecommunications carriers having interstate revenues to file, at different times throughout the year, a number of contributor reporting worksheets reflecting duplicative reporting requirements. Specifically, such carriers had to file four forms (*viz.*, Form 431, TRS Fund Worksheet; Form 457, Universal Service Worksheet; Form 496, NANPA Funding Worksheet; and Form 487, LNP Worksheet) containing revenue and other data on which contributions to support or cost recovery mechanisms were based. Consolidated Reporting Order, at ¶ 6.

substantive requirements of the support and cost recovery mechanisms. Instead, the rulemaking focuses on steps to reduce burdens on contributors, and burdens on the administrators *to* handle the contributions. by improving the data collection process. Id. at ¶ 5.⁶ Significantly, Form 457, the prior Worksheet pertaining to Universal Service contributions (see note 5, *supra*), specifically required telecommunications carriers to "file a revised Worksheet if it discover[ed] an error in the data that it reports." Form 457 contained no deadline for filing such revisions.

In its Consolidated Reporting Order, the FCC clarified that the new Telecommunications Reporting Worksheet would become effective upon approval by the Office of Management and Budget ("OMB"), but not less than 30 days from publication in the Federal Register. Id. at ¶ 32. The FCC delegated authority to make future changes to the Telecommunications Reporting Worksheet to the Chief of the Common Carrier Bureau. Consolidated Reporting Order, at ¶ 39. The FCC cautioned, however, that "[t]hese delegations extended to administrative aspects of the requirements, *e.g.*, where and when worksheets are filed, incorporating edits to reflect Commission changes to the substance of the mechanisms, and other similar details." Id. at ¶ 39. To ensure that its delegations to the Common Carrier Bureau were consistent, the FCC stated that it was amending its rules "to grant the Common Carrier Bureau delegated authority, in keeping with the current delegation for universal service purposes, to waive, reduce, modify, or

⁶ The FCC noted that in its September 25, 1998 Notice of Proposed Rulemaking and Notice of Inquiry to Initiate the Consolidated Reporting Order Proceeding, it sought comments on ways to streamline the filing requirements associated with the support and cost recovery mechanisms required under the Communications Act. Id. at ¶ 7. The FCC, however, never sought comment on whether to impose a statute of limitations for filing revisions to FCC Form 400-A on the length of any such statute or deadline.

Second Order on Reconsideration, III Appendix A, Universal Service Worksheet Form 457. Specific Instructions. C Block 3: Certification.

eliminate the contributor reporting requirements for the TRS, LNP, and NANP mechanisms, as necessary to preserve the sound and efficient administration of the support and cost recovery mechanisms." *Id.* at ¶ 40. The FCC "reaffirm[ed] that this delegation extends only to making changes to the administrative aspects of the reporting requirements, not to the substance of the underlying programs." *Id.* at ¶ 40 (emphasis added); 47 C.F.R. § 54.711(c.).

The Instructions to FCC Form 409-A require telecommunications providers to file a revised worksheet if it discovers an error in the revenue data that it reports.

Specifically, the Instructions provide that "[t]elecommunications providers should file revised Form 499-A revenue data by December 1 of the same filing year. Revisions filed after that must be accompanied by an explanation of the cause for the change along with complete documentation showing how the revised figures derived from corporate financial records." Telecommunications Reporting Worksheet, FCC Form 499-A, Instructions for Completing the Worksheet for Filing Contributions to Telecommunications Relay Service, Universal Service, Number Administration, and Local Number Portability Support Mechanisms, February 2002.⁸

⁸ Earlier versions of the Instructions to Form 499-A contained language essentially identical to the February 2002 Instructions. See Consolidated Reporting Order Appendix D -- Telecommunications Reporting Worksheet, at II (E) ("Contributors should file revised Form 490-A worksheet by December 31 of the same calendar year. Revisions filed after that must be accompanied by an explanation of the cause for the change along with documentation showing how the revised figures derive from corporate financial records.").

On March 2002, The Common Carrier Bureau announced the release of another revised Telecommunications Reporting Worksheet, FCC Form 499-A and accompanying instructions.⁹

d. The FCC's Form 499-Q

On March 9, 2001, the FCC adopted a rule change providing that Universal Service contributions be based on quarterly Telecommunications Reporting Worksheet filings, with an annual true-up based on an annual Telecommunications Reporting Worksheet. Federal-State Joint Board on Universal Service; Petition for Reconsideration by AT&T, CC Docket No. 96-45, FCC 01-85 (rel. March 14, 2001). In its Order, the FCC required such quarterly statements be made on FCC Form 499-Q. Moreover, in its Order, the FCC stated that "carriers will be allowed an opportunity to file a revised Form 499-Q prior to the filing date of the next Form 499. On April 6, 2001, the Common Carrier Bureau announced approval of FCC Form 499-Q by the Office of Management and Budget. On April 8, 2002, the Wireline Competition Bureau announced the release of revised FCC form 499-Q. The Instructions to Telecommunications Reporting Worksheet, FCC Form 499-Q provide that "[a] contributor must file a revised 499-Q

⁹Common Carrier Bureau Announces Release of Telecommunications Reporting Worksheet (FCC Form 499-A for April 1, 2002 Filing by All Telecommunications Carriers, CC Docket No. 98-171, Public Notice, 17 FCC Rd 43 15, (rel. March 4, 2002). In its Public Notice, the Common Carrier Bureau recognized that since the release of the initial version of the Telecommunications Reporting Worksheet, it has revised the Worksheet a number of times. Id. citing Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996, Policies and Rules Concerning Unauthorized Changes of Consumer Long Distance Carriers, CC Docket No. 94-1 21, Third Report and Order, 15 FCC Rd 15996, 16026 ¶ 63 (2000) (Slamming Third Report and Order) (revising FCC Form 499-A to include registration information); Contributor Reporting Requirements Order, 14 FCC Rd at 1661 ¶¶ 39-40 (delegating authority to the chief of the common carrier bureau to make changes to the telecommunications reporting worksheet); 47 C.F.R. §§ 52.17(b), 52.32(b), 54.711(c), 64.604(c)(5)(iii)(B).

worksheet if it discovers an error in the data that it reports, such as would arise if the filer discovered that it omitted or misclassified a major category of revenue. However, revised filings must be made by the filing date for the subsequent 499 filing." Id. at ¶ II(E).

e. The FCC's modification to the revenue-based methodology for assessing universal service contributions, and its retention of Forms 499-A and 499-Q

In December 2002, the FCC adopted several modifications to the revenue-based system to insure the sufficiency and the predictability of universal service. Among other things, the FCC modified the current revenue-based methodology by basing contributions on a percentage of projected collected, instead of historical gross-billed, interstate and international end-user telecommunications revenues reported by contributors on a quarterly basis. In the Matter of Federal-State Joint Board on Universal Service, at ¶ 19.

In adopting this modification, the FCC noted that contributors will continue to file a Form 499-Q on a quarterly basis and the Form 499-A on an annual basis. Id. at ¶ 33. The FCC further noted that, "[s]imilar to existing policies, contributors will have an opportunity to correct their projections up to 45 days after the due date of each Form 499-Q filing and through the annual true-up process. Id. (emphasis added). The FCC recognized that USAC would refund or collect from contributors any over-payments or under-payments.

- f. The FCC acknowledges that its rules do not contain deadlines for filing revised Forms 499-A and 499-Q, and concedes that any such deadlines are contained in the Instructions to these Forms

Significantly, consistent with its reference to "existing policies" regarding deadlines to file revised Form 499-Qs (see Section IV(1)(e), *supra*), as opposed to an existing rule, the FCC acknowledges that its "rules do not specifically address revised Form 499-Q filings..." In the Matter of Request for Review by ABC Cellular Corporation, Federal-State Joint Board on Universal Service, CC Docket No. 96-25; Changes to the Board Of Directors of the National Exchange Carrier Associations, Inc., CC Docket No. 97-21 (rel. December 17, 2002), 2002 WL 21818214 (FCC) at ¶ 12. Instead, the FCC recognizes that the Form 499-Q Instructions, as opposed to any rule, states that revised filings must be submitted by the next Form 499 filing deadline. Id. at 12.

2. The Administration Procedures Act ("APA") Notice and Rulemaking Process Must Be Strictly Followed When Adopting Substantive Rules

a. Requirement of notice and comment rulemaking for substantive rules

The APA defines "rule" as:

"the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy"

5 U.S.C. § 551 (4).

The APA's general rulemaking section, 5 U.S.C. § 553, sets down certain procedural requirements with which agencies must comply in promulgating a legislative rule: there must be publication of a notice of proposed rulemaking; opportunity for public

comment on the proposal; and publication of a final rule accompanied by a statement of the rule's basis and purpose. Utility Solid Waste Activities Group v. Environmental Protection Agency, 236 F.3d 749, 752 (D. D.C. 2001) *citing* Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 523-24 (1978). The APA's notice and comment procedures have two purposes: " ' to reintroduce public participation in fairness to affected parties after governmental authority has been delegated to unrepresentative agencies.'" (citations omitted); and to assure that the agency is presented with all information and suggestions relevant to the problem at issue. White v. Shalala, 7 F.3d 296, 303 (2d Cir. 1993).

Section 553(b)(1) of the **APA**, however, carves out an important exception to the rulemaking procedures. Agencies need not follow the prescribed rulemaking process to create "interpretive rules, general statement of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. § 553(b)(1).

Thus, agencies must perform notice-and-comment procedure prior to issuing a legislative rule, but producing a nonlegislative rule requires no such process. See 5 U.S.C. § 553. To distinguish whether a rule is nonlegislative or legislative, courts consider whether the rule is "substantive" in nature. Chrysler Corp. v. Brown, 441 U.S. 281, 301-02 (1979). Put another way, if a rule has substantive effects, it should have been promulgated as a legislative rule, and therefore the agency should have performed notice-and-comment to create it. Chrysler, 441 U.S. at 301-02; Professionals and Patients for Customized Care v. Shalala, 56 F.3d 592, 595 (5th Cir. 1995) (if a rule is "substantive," the exemption is inapplicable, and the full panoply of notice-and-comment requirements must be adhered to scrupulously).

A legislative rule is substantive if it has a binding, significant and immediate effect on the rights and obligations of the public. Chrysler, 441 U.S. at 301-02; *see also* Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897, 908 (5th Cir.1983) (substantive rules, "grant rights," "impose obligations," "produce other significant effects on private interest," or "have substantial legal effect"); Pcales v. Sullivan, M.D., 948 F.2d 1348, 1354 (2d Cir. 1991) (a "substantive regulation" is one which "grant[s] rights, impose[s] obligations, or produce[s] other significant effects on private interest."). Generally speaking, it seems to be established that "regulations," "substantive rules," or "legislative rules" are those which create law, usually implementary to an existing law. Professionals and Patients for Customized Care, 56 F.3d at 602."

The "APA's notice and comment exemptions must be narrowly construed." Professionals and Patients for Customized Care, 56 F.3d at 595. Indeed, a substantive rule promulgated without the requisite notice-and-comment, is unlawful. *Id.* Community Nutrition Institute, 818 F.2d at 946-49 (invalidating Food and Drug Administration's "action levels" because these rules were produced without notice-and-comment yet applied as law)

¹⁰ Although the APA itself does not define "substantive rules," "interpretive rules," or "statement of policy," courts over the years have developed a body of jurisprudence that is helpful in drawing the necessary -- but often illusory -- distinctions among the three types of rules. Professionals and Patients for Customized Care, 56 F.3d at 595 *citing* Community Nutrition Institute v. Young, 818 F.2d 943, 946 (D.C. Cir. 1987) (recalling that courts and commentators have described the distinction between substantive and interpretive rules or policy statement as, *inter alia*, "tenuous," "fuzzy," "blurred," "baffling," and "and shrouded in considerable smog").

b. Exception for interpretive rules

Nonlegislative rules, on the other hand, lack the binding effect of law and may not create obligations, convey rights, or cause significant effect. Chrysler, 441 U.S. at 301-02. Nonlegislative rules include "interpretive" regulation, which is simply an agency's "intended course of action, its tentative view of the meaning of a particular statutory term, or internal house-keeping measures organizing agency activities." Perales, 948 F.2d at 1354 (citations omitted). "Interpretive rules are not intended to alter legal rights, but to state the agency's view of what existing law requires." Sekula v. FDIC, 39 F.3d 448, 457 (3d Cir. 1994). Chrysler, 441 U.S. at 302 n. 31, 315-16 (noting that interpretive rules inform the public how an agency interprets the statute or how it administers its substantive rules and that interpretive rules do not create binding law); Alcaraz v. Block, 740 F.2d 593, 613 (9th Cir. 1984) (noting that interpretive rules are essentially hortatory and instructional and they are used more for discretionary fine-tuning than for general lawmaking).

Interpretive rules do not require prior notice to its enactment. Perales v. Sullivan, M.D., 948 F.2d at 1354.

c. Exception for general statements of policy

Nonlegislative rules also include general statements of policy. A general statement of policy is the outcome of neither a rulemaking nor an adjudication; it is neither a rule nor a precedent but is merely an announcement to the public of the policy which the agency hopes to implement in future rulemakings or adjudications. Pacific Gas and Electric Co. v. Federal Power Commission, 506 F.2d 33, 38 (D.C. App. 1974).

The critical distinction between a substantive rule and a general statement of policy is the different practical effect that these *two* types of pronouncements have on subsequent administrative proceedings. Id. A properly adopted substantive rule establishes a standard of conduct which has the force of law; the underlying policy embodied in the rule is not generally subject to challenge before the agency. Id.

A general statement of policy, on the other hand, does not establish a "binding norm." Id. It is not finally determinative of the issues or rights to which it is addressed. Id. The agency cannot apply or rely upon a general statement of policy as law because a general statement of policy only announces what the agency seeks to establish as policy. Id. A policy statement announces the agency's tentative intentions for the future. When the agency applies the policy in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued. Id. An agency cannot escape its responsibility to present evidence and reasoning supporting its substantive rules by announcing binding precedent in the form of a general statement of policy. Id. at 38-39.

d. Exception for agency organization, procedure, or practice

Finally, nonlegislative rules include rules of agency organization, procedure, or practice. The APA's Section 553(b)(A) has been described as essentially a "housekeeping" measure, Chrysler Corp. v. Brown, 441 U.S. at 310, "[t]he distinctive purpose of... [which] is to ensure 'that agencies retain latitude in organizing their internal operations.'" American Hospital Assn. v. Bowen, 834 F.2d 1037, 1047 (D.C. Cir. 1987). Where nominally "procedural" rules "encode[] a substantive value judgment" or "substantially alter the rights or interests of regulated" parties, however, the